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No. 227

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the Supreme Court of the United States

OCTOBER TERM, 1960

LINUS C. PAULING, ET AL., PETITIONERS

v.

H. McELROY, Secretary of Defense of the United ates; JOHN A. McCONE, Chairman of the Atomic ergy Commission of the United States; WILLARD LIBBY, HAROLD S. VANCE, JOHN S. GRAHAM and RAN F. FUGATE, Members of the Atomic Energy mmission of the United States.

TITION FOR A WRIT OF CERTIORARI TO THE UNITED ATES COURT OF APPEALS FOR THE DISTRICT OF LUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
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OPINIONS BELOW

o opinion was rendered by the District Court. The ion of the Court of Appeals (Pet. App. A) is re- ed at 278 F. 2d 252.

JURISDICTION

he judgment of the Court of Appeals was entered pril 12, 1960 (Pet. App. B). The petition for a

writ of certiorari was filed on July 11, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' complaints were properly dismissed for failure to state a justiciable controversy and for lack of standing to sue.

STATUTES INVOLVED

Sections 1 and 91 of the Atomic Energy Act of 1954, 68 Stat. 921, 936, 42 U.S.C. 2011, 2121, provide in relevant part as follows:

> 42 U.S.C. 2011. *Congressional declaration of policy.*
>
> Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—
>
> (a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and
>
> (b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. 2121. *Authority of Commission.*

(a) *Research and development; production of atomic weapons.*

The Commission is authorized to—

(1) conduct experiments and do research and development work in the military application of atomic energy; and

(2) engage in the production of atomic weapons, or atomic weapon parts, except that such activities shall be carried on only to the extent that the express consent and direction of the President of the United States has been obtained, which consent and direction shall be obtained at least once each year.

(b) *Material for Department of Defense use.*

The President from time to time may direct the Commission (1) to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of national defense, or (2) to authorize the Department of Defense to manufacture, produce, or acquire any atomic weapon or utilization facility for military purposes: *Provided, however,* That such authorization shall not extend to the production of special nuclear material other than that incidental to the operation of such utilization facilities.

* * * * *

STATEMENT

The petition involves two suits, consolidated in the courts below, by citizen-residents of the United States and non-resident aliens[1] who by their complaints (J. App. 1-28) seek a declaratory judgment that nuclear weapons tests are unlawful and an injunction restraining the Secretary of Defense and the Atomic Energy Commission from detonating any nuclear weapons that produce radiation or radioactive nuclei (J. App. 13-14; 27). The detonation of nuclear weapons is alleged to be illegal and beyond the scope of executive authority on the grounds that the Atomic Energy Act of 1954 does not authorize the detonation of nuclear weapons "creating radiation that damages the population of the world, among them the plaintiffs, their progeny and prospective progeny" (J. App. 12); and that the Atomic Energy Act of 1954 is unconstitutional (1) as an unlawful delegation of legislative power, (2) as so vague and indefinite as to vest arbitrary power in the respondents in violation of due process, (3) because "no power has been delegated to Congress to enact legislation as a result of which the atmosphere will be contaminated and the lives and progeny of the population damaged" (J. App. 13, 26), and (4) because the Act "is contrary to the human rights provisions of the Charter of the United Nations, to which the United States is a party * * * " (J. App. 13, 26).

Alluding to nuclear weapons tests between 1951 and

---

[1] The petitioners include eight citizens of the United States, six citizens of Japan, one citizen of Samoa, sixteen citizens of the Marshall Islands, three citizens of Britain, one citizen of France, one citizen of Germany, and one citizen of Canada.

1957 at Nevada test sites and the Eniwetok Proving Grounds and to announced tests to be conducted in 1958 at Eniwetok (J. App. 4-5, 19), the complaints alleged that the tests "did and will cause world-wide fallout of radioactive debris, did and will increase the radioactive strontium content of the soil and the amount of contamination of the food supply of the world and of the bones of human beings" (J. App. 5, 19); it is averred that the explosion of nuclear weapons "did and will cause the plaintiffs to be damaged genetically and somatically; will cause their progeny to be deleteriously affected because of the additional radiation brought about by the acts of the defendants, and, with high probability, did and will cause the plaintiffs to suffer various diseases which they would not suffer but for the additional radiation brought about by the acts of the defendants" (J. App. 5, 19-20).

On motions by the Secretary of Defense and Atomic Energy Commission (J. App. 29-30), the District Court (J. App. 35-36) dismissed the complaints on the ground that they fail to state a justiciable controversy and that none of the plaintiffs has standing to sue.[2] On appeal, the Court of Appeals, *per curiam*, affirmed (Pet. App. A), holding that "on the face of the pleadings the appellants are without standing to sue * * * [and that] the complaints presented no justiciable controversy." Judge Bazelon concurred in the affirmance insofar as the amended complaints (J. App. 32,

[2] In denying motions for preliminary injunctions, the District Court held that the assertedly illegal acts of the Secretary and Commission were authorized by a valid Act of Congress (J. App. 35-36). The Court of Appeals was of the same opinion (Pet. App. A, p. 4).

34) sought monetary damages; but he would have acceded to the post-appeal mootness motion filed by the Secretary and Commission on the ground that, subsequent to the July 31, 1958 order of dismissal, the 1958 nuclear weapons tests at Eniwetok were completed on October 30, 1958, and that by a series of self-imposed moratoria the United States "has not conducted any nuclear weapons tests since that time" and would not resume such tests, in the words of the President on December 29, 1959, "without announcing our intention in advance of any resumption" (Pet. App. A, p. 5). In Judge Bazelon's view, there was not sufficient probability that nuclear testing would be resumed to justify judicial intervention either by injunctive relief or by declaratory judgment (Pet. App. A., p. 5).

ARGUMENT

The dismissal of petitioners' complaints was clearly correct for the reasons assigned by the courts below. In addition, this case is not now ripe for further judicial action by reason of the completion of the 1958 nuclear weapons tests, the ensuing self-imposed moratoria on further tests, and the absence of any announcement by the President of an intention to resume nuclear weapons tests of the kind petitioners would have declared unlawful and enjoined. The petition for a writ of certiorari should, accordingly, be denied.[3]

[3] Neil H. McElroy's resignation as Secretary of Defense became effective on December 1, 1959. He was succeeded in office by the incumbent, Thomas S. Gates, Jr., on December 2, 1959. Insofar as it pertains to Mr. McElroy, the suits abated on June 2, 1960. *Snyder* v. *Buck*, 340 U.S. 15. In addition, a quorum of the Atomic Energy Commission, as it is presently constituted, are not at this time parties to these suits. Commissioner Libby resigned on June 30, 1959,

1. In the Atomic Energy Act of 1954, Congress declared it to be the policy of the United States that "the development, use, and control of atomic energy" shall be "subject at all times to the paramount objective of making the maximum contribution to the common defense and security * * *" (42 U.S.C. 2011). And Congress has found that: "The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security * * *" (42 U.S.C. 2012). In furtherance of this declared policy and its express finding, Congress has explicitly authorized the Atomic Energy Commission to (42 U.S.C. 2121):

> (1) conduct experiments and do research and development work in the military application of atomic energy; and
>
> (2) engage in the production of atomic weapons, or atomic weapon parts, except that such activities shall be carried on only to the extent that the express consent and direction of the President of the United States has been obtained, which consent and direction shall be obtained at least once each year.
>
> (b) The President from time to time may direct

---

and was succeeded by John H. Williams on August 13, 1959, who resigned effective June 30, 1960. A successor to Mr. Williams has not been appointed. Commissioner Vance died on August 31, 1959, and was succeeded by Robert E. Wilson on March 22, 1960. Commissioner Floberg resigned effective June 22, 1960, and was succeeded on June 23, 1960 by Loren K. Olson.

Petitioners have timely moved to substitute Commissioners Wilson and Olson, and this motion is now pending before the Court. Petitioners' motion to substitute Secretary Gates (inadvertently consented to by the Government) was filed in this Court in July, 1960, some time after the actions had abated as to Secretary McElroy.

the Commission (1) to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of national defense, or (2) to authorize the Department of Defense to manufacture, produce, or acquire any atomic weapon or utilization facility for military purposes: *Provided, however*, That such authorization shall not extend to the production of special nuclear material other than that incidental to the operation of such utilization facilities.

In the light of these statutory provisions, the authority of the Atomic Energy Commission and the Department of Defense to conduct nuclear weapons tests of the kind of which petitioners complain is not open to serious question; and in the exercise of its specific power to "provide for the common Defence * * * of the United States",[4] the constitutional authority of Congress to legislate on the subject is beyond doubt. It is no less apparent that, in seeking judicially to halt for all times the nuclear weapons tests described in the complaints, petitioners raise questions in the delicate areas of national defense and foreign policy[5] and hence "in the penumbra of the law where generally the Executive and the Legislative are

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[4] Constitution, Article I, Section 8.

[5] On August 22, 1958, the President proposed the negotiation of an international agreement for the suspension of nuclear weapons tests and the establishment of an international control system. An International Conference on the Discontinuance of Nuclear Tests convened originally on October 31, 1958. The Conference resumed on January 12, 1960, after a brief recess, and is presently underway. App., *infra*, pp. 13, 16-17.

supreme." *Panama Canal Company* v. *Grace Line, Inc.*, 356 U.S. 309, 317; *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109-111;[8] *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319; see also, *Hirabayashi* v. *United States*, 320 U. S. 81, 93. The authority of the Congress to legislate and of the Executive to act in this field are, as the courts below decided, clear; the remaining questions raised by the complaints are plainly not for judicial determination and the complaints were properly dismissed for want of a justiciable controversy.

2. Moreover, judicial abstention is forcefully called for here by reason of the fact that the "threatened" (J. App. 5, 19) nuclear weapons tests to be conducted in 1958, and to which the complaints filed in April and June 1958 refer, were completed on October 30, 1958. No tests have been conducted since that time and testing, producing radioactive fallout (see App., *infra*, pp. 18-19), will not be resumed without an announcement of our intention in advance of resumption. This governmental policy dates from August 22, 1958, when the President, on whose authority nuclear weapons tests are conducted, offered

---

[8] "* * * the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." 333 U.S. at 111.

o suspend such tests for one year from the beginning f his proposal for the negotiation of an international greement for the suspension of nuclear weapons tests App., *infra*, pp. 13, 16). Following nuclear test explosions by the Soviet Union in November, 1958, the President announced on November 7, 1958, that the Soviet Union's action relieved the United States of ny obligation to suspend nuclear weapons tests but hat the United States would continue suspension "for he time being" (App., *infra*, pp. 16-17). On August 6, 1959, the President directed that the suspension xtend to the end of 1959 and on December 29, 1959, e announced that the voluntary moratorium on testng would end on December 31, but that the United States would not resume nuclear weapons tests "without announcing our intention in advance of any resumption" (App., *infra*, p. 17). As of this date, here has been no announcement of an intention to esume nuclear tests of the type of which petitioners omplain (cf. App., *infra*, pp. 18-19).

Even on petitioners' view of the law then, the case s now wholly barren of any need for judicial consideration, either by injunction or declaratory judgment; nd for this additional reason the judgments of the ourts below are correct and further review by this ourt is unnecessary. "Especially where governmental action is involved, courts should not intervene nless the need for equitable relief is clear, not remote r speculative * * * [and] should avoid passing on uestions of public law even short of constitutionality hat are not immediately pressing." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431, 432; *Public Service*

ommission v. *Wycoff Co.*, 344 U.S. 237, 243; *New ork* v. *Illinois*, 274 U.S. 488, 489-490.[7]

3. As stated by the Court of Appeals (Pet. App. A. 3), petitioners, in their complaints, "do not allege a ecific threatened injury to themselves, apart from hers, but rather set themselves up as protestants, on half of all mankind, against the risks of nuclear con- mination in common with people generally."[8] As both the resident citizens and the non-resident aliens e complaints were, in these circumstances, properly smissed for want of the requisite standing to sue. *assachusetts* v. *Mellon*, 262 U.S. 447; *Perkins* v. *ikens Steel Co.*, 310 U.S. 113; *McCabe* v. *A., T. & S.F. y. Co.*, 235 U.S. 151; *Tennessee Electric Power Co.* v. *ennessee Valley Authority*, 306 U.S. 118. "The party ho invokes the [judicial] power must be able to show ot only that the statute is invalid but that he has stained or is immediately in danger of sustaining me direct injury as the result of its enforcement, nd not merely that he suffers in some indefinite way common with people generally." *Massachusetts* v.

---

[7] In neither this Court nor the Court of Appeals have the peti- oners taken particular exception to the District Court's dismissal their complaints which, as amended (J. App. 31-34), included a ayer for the award of damages. By petitioners' own acknowledg- ents (J. App. 31, 33), their alleged damages "are not monetarily mpensable." See Pet. App. A. p. 2, n. 2.

[8] "* * * [P]etitioners who are now before this Court filed sub-stan- ally the same complaint against the counterpart Russian authori- s of the respondents here by forwarding to the Procurator-General the U.S.S.R. on April 4, 1958 when the Pauling petitioners filed eir complaint, a document requesting the Russian judicial authori- s to hear the complaint and grant to the petitioners the same lief which was asked at the District Court for the District of olumbia * * *" (Pet. 10).

llon, supra, 262 U.S. at 488. The validity of this ng settled rule is not open to question and both courts low have properly held that on the facts averred in complaints the rule applies to this case.[9]

CONCLUSION

For the foregoing reasons, it is respectfully sub-tted that the petition for a writ of certiorari should denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MORTON HOLLANDER,
JOHN G. LAUGHLIN, JR.,
Attorneys.

AUGUST 1960.

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[9] *Johnson* v. *Eisentrager*, 339 U.S. 763, stands as an additional to the maintenance of the suits by the non-resident aliens who not appeal to the protection of the Constitution and laws of the ited States which "have no extraterritorial operation, unless in pect of our own citizens." *United States* v. *Belmont*, 301 U.S. 324, 2; *United States* v. *Pink*, 315 U.S. 203, 226. And the international nmitments and agreements between the United States and other reign nations (the Charter of the United Nations, the Trustee-p Agreement for the Former Japanese Mandated Islands, the de of the Trust Territory of the Pacific Islands), relied upon by itioners, do not purport to remove the jurisdictional bars that erwise stand in the way of these suits. Cf. *George E. Warren rp.* v. *United States*, 94 F. 2d 597, 599 (C.A. 2), certiorari denied, 4 U.S. 572; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 73.

APPENDIX

DEPARTMENT OF STATE

FOR THE PRESS

gust 26, 1959

TENSION BY U. S. OF VOLUNTARY SUSPENSION OF NUCLEAR WEAPONS TESTS

The President has directed that the unilateral sus-sion of nuclear weapons testing by the United States rently in effect be extended throughout this calendar r. This decision was taken in the light of the agreed weeks recess announced today by the negotiating ties at the Geneva Conference on the Discontinu-e of Nuclear Weapons Tests.

On August 22, 1958, the United States, in order to ilitate negotiations for a controlled discontinuance nuclear weapons tests, offered to withhold further ing of atomic and hydrogen weapons for a one year iod from the beginning of the negotiations unless ing was continued by the Soviet Union.

s announced, the United States did, on October 31, 8, suspend all nuclear weapons tests. The United ngdom did likewise.

On November 7, after the Atomic Energy Commis-n detected continuing nuclear weapons tests by the iet Union on November 1 and November 3, respec-ly, the President stated that "this action by the iet Union relieves the United States from any obli-ion under its offer to suspend nuclear weapons tests. wever, we shall continue suspension of such tests for time being. . . ." As far as can be determined the iet Union has conducted no such tests since Novem-3, 1958.

n continuing its voluntary suspension of atomic and rogen weapons tests to December 31, 1959, the

ed States wishes to allow a reasonable period of
for the negotiations to proceed following their
mption on October 12, 1959.

* * * * *

December 29, 1959.

THE WHITE HOUSE
Augusta, Georgia

STATEMENT BY THE PRESIDENT

e negotiations with respect to the cessation of nu- testing have now been in progress for fourteen hs. While now recessed, they will soon be re- d. No satisfactory agreement is yet in sight. rospects for such an agreement have been injured e recent unwillingness on the part of the politically ed Soviet experts to give serious scientific con- ation to the effectiveness of seismic techniques for etection of underground nuclear explosions. In- the atmosphere of the talks has been clouded by ntemperate and techically unsupportable Soviet x to the report of the technical experts. The dis- ished American group of scientists who composed United States delegation will make public from erbatim records of the conference the facts which completely refute this Soviet document.

e will resume negotiations in a continuing spirit of ng to reach a safeguarded agreement. In the ntime, the voluntary moratorium on testing will e on December 31.

though we consider ourselves free to resume nu- weapons testing, we shall not resume nuclear ons tests without announcing our intention in ad- e of any resumption. During the period of volun- suspension of nuclear weapons tests the United es will continue its active program of weapon re- h, development and laboratory-type experimenta-

* * * * *

UNITED STATES ATOMIC ENERGY COMMISSION
Washington 25, D.C.

January 18, 1960

Your Reference:
GCD:SDS:DBM:vc
145-15-40 and -41

Honorable George Cochran Doub,
Assistant Attorney General,
Civil Division,
Department of Justice
Attention: Mr. Samuel D. Slade, Chief, Appellate Section
Subject: PAULING v. MCELROY, No. 14742; HEINE v. MCELROY, No. 14743

DEAR MR. DOUB:

This is in response to your request for a statement disclosing the present situation of the Atomic Energy Commission with respect to conducting any future nuclear weapons tests. The last nuclear weapons tests conducted by the Commission took place on October 30, 1958.

President Eisenhower's statement of August 22, 1958, proposing the international negotiation of an agreement for the suspension of nuclear weapons tests and the establishment of an international control system, included the statement— ". . . The United States is prepared, unless testing is resumed by the Soviet Union, to withhold testing on its part of atomic and hydrogen weapons for a period of one year from the beginning of the negotiations."

Following Russian nuclear test explosions of November 1, 1958, and November 3, 1958, the President issued a statement on November 7, 1958, which said in part:

". . . This action by the Soviet Union relieves the United States from any obligation of its offer to suspend nuclear weapons tests. However, we shall continue suspension of such tests for the time being, and we understand that the United Kingdom will do likewise." On August 26, 1959, the President directed that the suspension be extended to the end of 1959.

On December 29, 1959, the President announced that "the voluntary moratorium on testing will expire on December 31. Although we consider ourselves free to resume nuclear weapons testing, we shall not resume nuclear weapons tests without announcing our intention in advance of any resumption." The President further stated that, "No satisfactory agreement is yet in sight" with the Soviet Union for the cessation of nuclear testing. A copy of the President's complete statement has previously been furnished you.

The Conference on the Discontinuance of Nuclear Tests referred to in the President's statement of December 29, 1959, convened originally on October 31, 1958. It recently resumed on January 12, 1960, after a brief recess, and is presently underway.

As you know, testing of atomic weapons is conducted only to the extent authorized by the President. The Atomic Energy Commission is maintaining its test facilities at the Nevada Test Site and the Eniwetok Proving Ground in a standby state.

Sincerely,

/S/ A. R. Luedecke,
General Manager.

May 7, 1960.

THE WHITE HOUSE

The President today announced approval of a major expansion of the present research and development directed toward an improved capability to detect and identify underground nuclear explosions. The present United States program has evolved from the recommendations set forth by the Panel on Seismic Improvement ("Berkner Panel"). For Fiscal Year 60, it has been funded for approximately $10,000,000. During Fiscal Year 61, it is anticipated that the funds required will be about $66 million for all aspects of the seismic research and development program.

Known as Project VELA, the program calls for increased basic research in seismology; procurement of instruments for a world-wide seismic research program; development of improved seismic instruments; construction and operation of prototype seismic detection stations; and an experimental program of underground detonations encompassing both high explosive and where necessary nuclear explosions. The planned program provides for investigation of all aspects of improvement that are considered to be feasible.

Such nuclear explosions as are essential to a full understanding of both the capabilities of the presently proposed detection system and the potential for improvements in this system would be carried out under fully contained conditions and would produce no radioactive fallout. In order to develop sufficient reliable data from the program, it is anticipated that it will be necessary to conduct a series of explosions of various sizes, in differing types of geological formations.

Recently, the Soviet negotiators at Geneva concurred with the proposal that underground nuclear explosions should be conducted to improve the capability of the

proposed control network to detect and identify underground explosions.

They have also indicated a willingness to discuss research and development in the seismic detection area with the United States and the United Kingdom. Agreement has been reached to convene a group of USSR, U.K. and U.S. scientists in Geneva on May 11 to exchange information on the seismic research activities of the three nations as a basis for future determination of the areas in which coordinated or joint research would be most fruitful.

Government agencies including the Department of Defense, the Atomic Energy Commission, the Department of Commerce and the Department of Interior, as well as universities, and private organizations, will participate in carrying out the United States program of research and development related to the detection and identification of nuclear detonations.

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October Term, 1960.

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INUS C. PAULING, *et al.*,

Petitioners,

vs.

EIL H. McELROY, etc., *et al.*,

WIGHT HEINE, *et al.*,

Petitioners,

vs.

EIL H. McELROY, etc., *et al.*

On Petition for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

SUGGESTION OF MOOTNESS.

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IN THE

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October Term, 1960.
No. 227

us C. Pauling, *et al.*,

Petitioners,

vs.

il H. McElroy, etc., *et al.*,

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ight Heine, *et al.*,

Petitioners,

vs.

il H. McElroy, etc., *et al.*

SUGGESTION OF MOOTNESS.

Respondents in their brief in opposition have, in substance, suggested mootness to this Court (Br. in Opp. nt 2, pp. 9-11; Appx. pp. 13-19). They have, in ect, renewed here their motion made in the court ow, which motion Judge Bazelon, concurring and dissting, felt should be granted (Pet.; Appx. A, p. 5).[1]

---

[1] Respondents' motion in the court below read:

"MOTION OF APPELLEES TO AFFIRM THE ORDER OF THE DISTRICT COURT

"Appellees move the Court to affirm the order of the court below dismissing the complaints, on the ground that there is not now sufficient certainty or probability that there will be further nuclear weapons tests to invoke the District

deed, respondents have themselves described their mo-
n as a "post-appeal mootness motion" (Br. in Opp.
6).

In the court below, petitioners opposed the mootness
tion. Upon further reflection, however,[2] they be-
ve that the mootness suggestion is well taken.

In their memorandum in support of their motion in
court below, respondents stated (p. 5, footnote 3):

> "Affirmance on this ground would, of course, leave appellants free to institute a new action if the resumption of nuclear weapon tests should become imminent. *United States v. W. T. Grant Co.*, 345 U. S. 629, 636."

Accordingly, petitioners are now in accord with the
ggestion of mootness and, further, respectfully sug-
st that the order of this Court in relation thereto
ght be (*DeSimone v. United States*, 361 U. S. 125;
otherhood of Locomotive Firemen and Enginemen,

Court's equitable jurisdiction to enjoin such tests or to issue a declaratory judgment as to the legality of such tests.

"In support of this motion the Court is respectfully referred to the letter of Alvin R. Luedecke, General Manager of the Atomic Energy Commission, attached hereto, and the memorandum filed in support hereof."

documents attached to the Motion (save the legal memoran-
n) were the very same documents set out here by respondents
heir Brief in Opposition (Appx. pp. 13-17), save, of course,
White House press release of May 7, 1960 issued subsequent
he decision of the Circuit Court of Appeals (Appx. pp. 17-

f. Mr. Justice Frankfurter, dissenting, in *Hensler v. United
ters National Bank & Trust Co.*, 335 U. S. 595, 600: "Wis-
too often never comes, and so one ought not reject it merely
ause it comes late." And Mr. Justice Jackson, concurring, in
Grath v. Kristensen, 340 U. S. 163, 177-178.

U. S. 748; *Securities and Exchange C mission ong Island Lighting Co.*, 325 U. S. 833; *United s v. W. T. Grant Co.*, 345 U. S. 629, 636):

"The petition for certiorari is granted. The judgment of the Circuit Court of Appeals is vacated and the cases are remanded to the District Court with directions to dismiss the complaints as moot and without prejudice to petitioners instituting a new action if the resumption of nuclear weapons tests should become imminent."[3]

Respectfully submitted.

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here is no merit to respondents' assertion (Br. in Opp. p. 3), based on *Snyder v. Buck*, 340 U. S. 15, that the suits the Secretary of Defense have abated. Whether Secretary succeeded Secretary McElroy on December 2, 1959 is be- the point. The juridical fact is that Secretary Gates' ap- ment was not confirmed by the Senate until January 26, 1960 Cong. Rec. [Daily] 1114). The motion to substitute tary Gates for Secretary McElroy was filed on or about 14, 1960, well within the six month limitation of Rule , Federal Rules of Civil Procedure.